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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 NORTHWEST COALITION FOR
9 ALTERNATIVES TO PESTICIDES,
10 et al.,

11 Plaintiffs,

12 v.

13 UNITED STATES
14 ENVIRONMENTAL PROTECTION
15 AGENCY, et al.,

16 Defendants,

17 v.

18 CROPLIFE AMERICA, et al.,

19 Intervenor-Defendants.

C10-1919 TSZ

ORDER

20 THIS MATTER comes before the Court on Intervenor-Defendants' motion to
21 dismiss first and third claims, docket no. 147. Having considered the motion and all
22 pleadings filed in support of and opposition thereto, the Court enters the following Order.

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1 **Background**

2 Plaintiffs filed a Supplemental Complaint on September 17, 2013. Supplemental
3 Complaint, docket no. 137. Plaintiffs generally allege that the Environmental Protection
4 Agency (“EPA”) has failed to comply with its obligations under the Endangered Species
5 Act (“ESA”) to protect salmon and steelhead (collectively, “salmonids”) from certain
6 pesticide use. The pending motion is brought by Intervenor-Defendants (“Intervenors”) to
7 dismiss Plaintiffs’ first and third claims. Intervenor’s Motion, docket no. 147.

8 Plaintiffs’ first claim alleges that EPA is violating ESA Section 7 by failing to
9 complete consultation with the National Marine Fisheries Service (“NMFS”) for its
10 ongoing authorization of uses of three organophosphate (“OP”) pesticides. Supplemental
11 Complaint at ¶¶ 76-82. As a result of prior litigation, EPA initiated consultation with
12 NMFS regarding these and other pesticides between August 2002 and December 2004.
13 Id. at ¶ 3. NMFS issued a biological opinion (“BiOp”) on the OP pesticides (“OP BiOp”) on
14 November 18, 2008, concluding that use of the OP pesticides would jeopardize the
15 continued existence of 27 species and destroy or adversely modify the critical habitat of
16 25 of those species. Id. at ¶ 6. The OP BiOp required the implementation of certain
17 measures to ensure protection of the affected species. Id. On February 21, 2013, the
18 Fourth Circuit vacated the OP BiOp and remanded it to NMFS for additional explanation.
19 Id. at ¶ 12 (citing Dow AgroSciences LLC v. Nat’l Marine Fisheries Serv., 707 F.3d 462
20 (4th Cir. 2013)).

21 Plaintiffs’ third claim alleges that EPA is unlawfully taking listed salmonids in
22 violation of ESA Section 9. Id. at ¶¶ 89-97. Plaintiffs’ third claim takes issue with
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1 EPA's authorization of both the OP pesticides as well as three "carbamate" pesticides.
2 NMFS issued a BiOp with respect to the carbamate pesticides on April 20, 2009,
3 ("Carbamate BiOp"), concluding that the use of the carbamate pesticides would
4 jeopardize 22 species and likely destroy or adversely modify the habitat of at least 20
5 species. Id. at ¶ 7. The Carbamate BiOp articulated a comprehensive Reasonable and
6 Prudent Alternative ("RPA") with specific protections to avoid harm to the affected
7 species and required implementation of the RPA within one year. Id. The Carbamate
8 BiOp included an Incidental Take Statement ("ITS") authorizing some "take" of listed
9 salmonids from EPA's authorization of the carbamate pesticides, so long as EPA
10 complied with the RPA and Reasonable and Prudent Measures ("RPMs") articulated in
11 the BiOp. Id. at ¶ 9.

12 **Discussion**

13 **A. Standard of Review**

14 In order to survive a motion to dismiss pursuant to Rule 12(b)(6) of the Federal
15 Rules of Civil Procedure, a plaintiff must allege "enough facts to state a claim for relief
16 that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In
17 reviewing the adequacy of the complaint, the Court must accept all well-pleaded
18 allegations as true, South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 782 (9th Cir. 2008),
19 and draw all reasonable inferences in favor of the plaintiff. Twombly, 550 U.S. at 555.
20 Similarly, in considering a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, the
21 Court takes the allegations in the plaintiff's complaint as true. Wolfe v. Strankman, 392
22 F.3d 358, 362 (9th Cir. 2004).

1 **B. Plaintiffs’ First Claim: Failure to Complete Consultation with NMFS in**
2 **Violation of ESA Section 7**

3 Intervenors argue that Plaintiffs have failed to identify any affirmative agency
4 action triggering a duty to consult with NMFS. In the alternative, Intervenors claim that
5 any duty to consult has been met by EPA’s prior initiation of consultation.

6 **1. Agency Action Requiring Consultation**

7 Section 7 of the ESA requires any federal agency to “insure that any action
8 authorized, funded, or carried out by such agency (hereinafter . . . referred to as an
9 “agency action”) is not likely to jeopardize the continued existence of any endangered
10 species or threatened species or result in the destruction or adverse modification of
11 habitat of such species.” 16 U.S.C. § 1536(a)(2). Section 7 imposes on an agency a duty
12 to consult with the expert wildlife agencies “before engaging in any discretionary action
13 that may affect a listed species or critical habitat.” Karuk Tribe of Cal. v. United States
14 Forest Serv., 681 F.3d 1006, 1020 (9th Cir. 2012). “The purpose of consultation is to
15 obtain the expert opinion of wildlife agencies to determine whether the action is likely to
16 jeopardize a listed species or adversely modify its critical habitat and, if so, to identify
17 reasonable and prudent alternatives that will avoid the action’s unfavorable impacts.” Id.
18 An “agency action” is defined broadly under the ESA, but is limited to “actions in which
19 there is discretionary Federal involvement or control.” Id. (citation omitted). “An
20 agency must consult under Section 7 only when it makes an “affirmative” act or
21 authorization.” Id.

1 Intervenor argue that Plaintiffs have failed to identify any affirmative act by EPA
2 triggering a duty to consult. Defendant EPA filed a response concurring with this
3 argument. Defendant's Response, docket no. 149. Plaintiffs argue that the EPA's
4 authorization is an ongoing agency action and that the Ninth Circuit's decision in Karuk
5 Tribe did not overrule prior case law holding ongoing action sufficient to trigger
6 consultation.

7 In Karuk Tribe, the Ninth Circuit discussed the relevant law regarding agency
8 action. Intervenor argue that Karuk Tribe implicitly overruled prior case law holding
9 ongoing agency control constitutes "agency action," and that under Karuk Tribe, there is
10 no duty to consult unless the agency takes a new affirmative action. One district court
11 judge has considered this precise issue and agreed with the position of Intervenor here.
12 In Center for Biological Diversity v. EPA, 2013 U.S. Dist. LEXIS 169015 (N.D. Cal.
13 Nov. 25, 2013) ("CBD"), Judge Spero held that "to the extent prior cases held that
14 ongoing control over a previous agency action is sufficient to trigger Section 7's
15 consultation requirement without any further affirmative act, those holdings have been
16 implicitly overruled in Karuk Tribe." Judge Spero held that EPA's failure to initiate
17 consultation with respect to pesticides is not an affirmative act constituting agency action.
18 Id.

19 However, the issue of ongoing agency action was not squarely before the Karuk
20 Tribe court. Furthermore, the court cited with approval the line of cases which developed
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1 the ongoing action analysis.¹ One district court considering Karuk Tribe disagreed with
2 the conclusion in CBD that Karuk Tribe implicitly overruled Pacific Rivers, one such
3 ongoing action case. See Salix v. United States Forest Serv., 944 F. Supp. 2d 984, 998
4 (D. Mont. 2013). Finally, this Court held that “Karuk Tribe cannot reasonably be read to
5 implicitly or silently overrule the Ninth Circuit’s reasoned holdings that, in circumstances
6 where a plaintiff challenges a federal agency’s failure to act under the citizen suit
7 provision of the ESA, review is not confined to an administrative record.” Northwest
8 Coalition v. United States EPA, 920 F. Supp. 2d 1168, 1174 (W.D. Wash. 2013).
9 Similarly, the Court declines to read Karuk Tribe as silently or implicitly overruling prior
10 Ninth Circuit precedent holding that ongoing agency action is sufficient to trigger the
11 ESA consultation requirement.

12 **2. Prior Consultation**

13 Intervenor’s argue in the alternative that even if Plaintiffs identified agency action
14 triggering EPA’s duty to consult, EPA has already met that duty by initiating consultation
15 with NMFS. This argument is ultimately not persuasive. On its face, this argument has
16 merit because EPA previously initiated consultation, and it is not due to any fault of EPA
17 that the OP BiOp was vacated. However, if EPA had not initiated consultation, the Court
18 would have authority to order injunctive relief until consultation is complete, as was
19 ordered in the prior litigation between these parties. Furthermore, the ESA requires an
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21 ¹ See Karuk Tribe, 681 F.3d at 1021 (citing Wash. Toxics Coal. v. Env’tl. Prot. Agency, 413 F.3d 1024,
22 1031-33 (9th Cir. 2005), Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv., 340 F.3d 969,
23 974 (9th Cir. 2003), and Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054-55 (9th Cir. 1994)).

1 agency to ensure its actions do not jeopardize an endangered species. Depriving
2 Plaintiffs of any recourse to enjoin such agency actions would not comport with the
3 requirements of the ESA. The Court holds that Plaintiffs' first claim contains sufficient
4 facts to state a claim for relief that is plausible on its face and Intervenor's motion to
5 dismiss the first claim is DENIED.²

6 **C. Plaintiffs' Third Claim: Unlawful Taking of Salmonid in Violation of ESA**
7 **Section 9**

8 Intervenor's argue that the Court lacks subject matter jurisdiction over Plaintiffs'
9 third claim because Plaintiffs have failed to meet the jurisdictional requirements of the
10 Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") Section 16(b). FIFRA
11 contains a provision allowing for judicial review of an agency order issued following a
12 public hearing, within 60 days after entry of the order, by filing a petition with the court
13 of appeals. 7 U.S.C. § 136n(b). Intervenor's argue that this is the sole avenue for review
14 of EPA's pesticide registration decisions.

15 The cases cited by Intervenor's involved "failure to consult" claims, which
16 challenge the validity of an agency action and are distinguishable from a takings claim.
17 See, e.g., American Bird Conservancy v. FCC, 545 F.3d 1190, 1193 (9th Cir. 2008). For
18 example, in American Bird, the plaintiff attempted to frame its challenge as solely an
19 objection to the FCC's failure to consult before issuing registrations, not as a challenge to
20 the registrations. Id. The court disagreed, finding that because plaintiff objected to

21 ² Alternatively, Intervenor's agency action argument is barred by *res judicata* because Intervenor's
22 previously argued and lost this argument in the case of Washington Toxics Coalition, et al. v.
23 Environmental Protection Agency, et al., No. C01-0132-C (W.D. Wash.).

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2 specific registrations which it alleged were not supported by appropriate consultation, the
3 core objection was to the registrations themselves. Id.

4 In contrast with a failure to consult case, a takings claim does not challenge the
5 administrative validity of any agency order. Rather, a takings claim focuses on the actual
6 harm done to the affected species and is therefore not governed by FIFRA's judicial
7 review provision. Intervenor's argue that, despite Plaintiffs' artful pleading, the substance
8 of the claim is a challenge to EPA's administrative action because EPA itself is not
9 applying pesticides in ways that affect salmon. However, Plaintiffs have alleged that
10 "EPA's take of listed salmonids violates section 9 of the ESA."³ Supplemental
11 Complaint at ¶ 97. Therefore Plaintiffs have pleaded a takings claim and jurisdiction in
12 this Court is proper. The motion to dismiss is DENIED.

13 **D. Plaintiffs' Surreply and Motion to Strike**

14 Plaintiffs move to strike portions of Intervenor's reply brief which raise new
15 arguments based on EPA's response brief. The Court GRANTS the motion and
16 STRIKES the following: (1) Page 1, lines 6-8; (2) Page 3, lines 13-20; and (3) Page 5,
17 lines 6-9 and 23-26. The first two sections mischaracterize EPA's response, while the
18 third is a new argument improperly raised for the first time in Intervenor's reply.

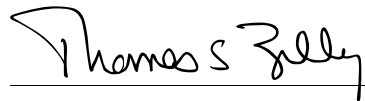
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22 ³ Whether or not the actions allegedly taken by EPA are sufficient to constitute a takings claim is not
23 before the Court at this time and will likely be resolved later in the proceedings.

1 **Conclusion**

2 For the foregoing reasons, Intervenor's motion to dismiss, docket no. 147, is
3 DENIED. The Court GRANTS Plaintiffs' motion to strike, docket no. 157.

4 IT IS SO ORDERED.

5 Dated this 28th day of January, 2014.

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7 THOMAS S. ZILLY
8 United States District Judge
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